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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No.

HARRY LERMAN, MYER LERMAN, and SAMUEL LERMAN, Co-partners trading as LERMAN BROTHERS, *Petitioners,*

v.

FRUIT PROCESSORS, INC., a corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, the Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Lerman Brothers pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on June 28, 1951.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 28, 1951. A petition for rehearing, filed July 12, 1951, was denied on August 29, 1951 (R. 177). Jurisdiction of this Court is invoked under 28 U. S. Code, Section 1245(1).

OPINIONS BELOW.

The decision of the District Court is unreported as it filed no opinion. Its oral comments at the conclusion of the trial appear at R. 139 and its findings appear at R. 49. The opinion of the Court of Appeals for the District of Columbia (R. 154) is not yet reported. The petition for rehearing was denied without opinion (R. 177).

The District Court decision affirmed a reparation order of the Secretary of Agriculture (R. 39) which was founded upon an alleged violation of Section 2(2) of the Perishable Agricultural Commodities Act.[1] The Court of Appeals held that the findings of the District Court and the Secretary as to the terms of the written contract involved were contrary to the evidence but affirmed the order upon the theory that a modification of these terms had occurred which had not been claimed or found below.

STATUTES INVOLVED.

The full text of the pertinent sections of the Perishable Agricultural Commodities Act is set forth in Appendix I to this petition. The particular provision which petitioners were charged with violating is Section 2(2), which reads as follows:

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[1] Act of June 10, 1930, ch. 436, 46 Stat. 531; Act of April 13, 1934, ch. 120, 48 Stat. 584; Act of August 20, 1937, ch. 719, 50 Stat. 725; Act of June 29, 1940, ch. 456, 54 Stat. 696; 7. U. S. Code, § 499.

UNFAIR CONDUCT.

Sec. 2. It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

* * *

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer;

* * *

The section of the Statute which governs judicial review of proceedings under the Act reads in part as follows:

Sec. 7(c) . . . Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated. . . . Such petition and pleadings certified by the Secretary upon which decision was made by him shall constitute the pleadings upon which said trial de novo shall proceed subject to any amendment allowed in that court;

QUESTIONS PRESENTED.

1. Whether a Court of Appeals may find a violation of the Perishable Agricultural Commodities Act upon grounds not presented to the Secretary of Agriculture or the District Court?

2. Whether a refusal to pay sight drafts issued for merchandise not delivered to the buyer is a rejection "without reasonable cause" in violation of the Act?

STATEMENT OF THE CASE.

Petitioners are a District of Columbia partnership engaged in the wholesale grocery business. They were charged with violating Section 2(2) of the Perishable Agricultural Commodities Act by rejecting, without reasonable cause, frozen raspberries allegedly delivered in accordance

with the terms of a written contract made with respondent, Fruit Processors, Inc., of St. Joseph, Michigan. The Secretary of Agriculture awarded the respondent damages of more than $14,000.00 upon findings which the Court of Appeals' opinion shows were erroneous.

Fruit Processors' sworn complaint before the Secretary made the following allegations as to the terms of the written contract of sale, Lerman's Exhibit 1 (R. 108, 142) which the Court of Appeals opinion shows were untrue.

1. That the stated price for the one pound boxes was forty cents a pound (¶4, R. 6). The price in the written contract, as stated in the opinion, was "S.A.P.", meaning subject to approval [of buyer] as to price (R. 159).

2. That the merchandise was to be "shipped to Swift & Company Union Stockyards, Chicago, Ilinois, via trucks" (¶4, R. 6). As the opinion states, the written contract called for shipment to petitioners at Washington, D. C., "f.o.b. Michigan" and says nothing about any truck shipments to Chicago or elsewhere (R. 160).

3. That the terms of sale were "sight draft with warehouse transfer orders attached" (¶4, R. 6). The contract set out in the opinion does not provide for payment upon submission of warehouse transfer orders, attached to sight drafts or otherwise (R. 157, 160).

The Secretary erroneously found, upon the sole basis of these false allegations in the complaint that the contract of sale (1) fixed a price of forty cents a pound for the one pound boxes (¶3, R. 40), (2) provided for delivery of the merchandise at the Swift Warehouse in Chicago (¶4, (R. 40), and (3) that the terms of payment were net cash, sight draft *with warehouse transfer order attached* (¶5, (R. 40).[2]

[2] These findings are based upon the complaint instead of evidence because the petitioners naively supposed that an informal letter denying liability would serve as an answer (R. 45). For want of a formal answer, the Secretary entered a default, and in accordance with his rules of practice, accepted the allegations of the complaint as true (R. 43-44).

The Secretary also erroneously found upon the basis of other false allegations in the complaint that the alleged shipments were made to the warehouse on July 10, 12, and 25, when the sight drafts that petitioners refused to pay were issued (¶9, R. 41; ¶¶9, 10, 11, R. 41). The warehouse receipts for the shipments show that 40,800 pounds of two pound boxes were received at the warehouse for Fruit Processors' account in three installments on July 9, 10, and 11 (R. 24-27, 63-64), which do not correspond, either in total amount or individually, with the amounts for which drafts were issued on July 10 and 12 (R. 35), respectively, and that 17,232 of the one pound boxes were similarly received on July 16 and 17, although the draft for this merchandise was not issued until July 25 (R. 36).

At the trial in the District Court, Fruit Processors introduced only the record before the Secretary of Agriculture, which consists of the complaint, the attached exhibits and the Secretary's findings and order (R. 59), thus relying upon the prima facie effect of the Secretary's findings. Petitioners then showed that the shipments to the Chicago warehouse were made for respondent's own convenience without any instructions from petitioners (R. 68) and that the only written contract ever made for the one and two pound boxes was the brokers memorandum calling for shipment to petitioners at Washington, D. C., "f.o.b. Michigan" (R. 81-82).

Although the Act provides for a trial de novo,[3] the District Court, instead of regarding the Secretary's findings as *prima facie* evidence, adopted all of the Secretary's findings verbatim, as its own, including the erroneous findings as to the contract terms and deliveries noted above (R. 50).

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[3] The default before the Secretary, while it put upon the petitioners the burden of attacking the order, did not otherwise limit them in the presentation of their defenses in the trial de novo in the District Court, nor did it permit the Secretary's findings to stand after the evidence had disproved them. In the District Court, petitioners were then entitled to a trial afresh, as though no previous action had been taken. *Spano* v. *Western Fruit Growers, Inc.*, 83 F. 2d 150, 151 (CCA 10, 1936).

The District Court also decided an inspection issue, which had not been raised before the Secretary. It held, contrary to the Secretary's own regulation defining the rights of the parties to an "f.o.b." sale,[4] that an "f.o.b." contract confers no right of inspection before payment, to see whether the merchandise is in accordance with the contract (R. 53). It also held that if such a right of inspection existed, petitioners had waived it by failing to assert it within six hours of the arrival of the truck shipment at Chicago, as prescribed in the Secretary's regulation[5] estab-

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[4] The applicable regulation (Title 7, Code of Federal Regulations, Ch. I, Part 46, § 46.24) reads as follows: "Unless otherwise defined, the following terms when included in a contract or communication involved in any investigation made or hearing held pursuant to the Act shall be construed respectively, as follows: . . .

(1) 'F. O. B.' (for example, 'f. o. b. Laredo, Tex.,' or even 'f. o. b. California') means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of land transportation at the shipping point, in suitable shipping condition (see definitions of 'suitable shipping condition', paragraphs (j) and (k) of this section), and that the buyer assumes all risk of damage and delay in transit not caused by the shipper, irespective of how the shipment is billed. *The buyer shall have the right of inspection at destination before the goods are paid for,* but only for the purpose of determining that the produce shipped complied with the terms of the contracts or order at time of shipment, subject to the provisions covering suitable shipping condition. Such right of inspection shall not convey or imply any right of rejection by the buyer because of any loss, damage, or deterioration, or change which has occurred in transit." (Emphasis supplied)

[5] This regulation, Section 46.2 (r), reads as follows: "(r) 'Reasonable time,' as used in paragraph (q) of this section means, with respect to rail shipments, not to exceed 24 hours after receipt of notice of arrival of the produce; with respect to truck shipments, not to exceed 6 hours after receipt of notice of arrival of the produce; and, with respect to boat shipments, not to exceed 24 hours after the produce is unloaded and made accessible for inspection, unless the purchaser applies for Federal inspection of the produce within such period, or unless at the time of the receipt by the purchaser of notice of arrival of the produce the temperature is sufficiently below freezing to render a complete inspection of the produce dangerous thereto, commodity and existing weather considered. In case the temperature is dangerously below freezing at the time of arrival of the produce, a preliminary inspection for the sole purpose of determining whether transit

lishing the time within which deliveries must be accepted or rejected (R. 53). This latter holding was consistent with the erroneous findings that the truck shipments had been made to petitioners but could not survive the undisputed evidence that those shipments were not made to petitioners (R. 61).

The Court of Appeals correctly concluded that Fruit Processors had not made the written contract or the deliveries alleged in its complaint and found by the Secretary and the District Court. After noting that respondent had not complied with the delivery terms of the written contract, the Court of Appeals says that such non-compliance was not assigned by petitioners "as a reason for repudiation of the contract" when they rejected the drafts (R. 160). It held that petitioners had waived compliance with the delivery requirements of the written contract by requesting inspection of the merchandise at the Chicago warehouse and by other conduct subsequent to the making of the contract (R. 161).

The waiver found by the Court of Appeals was not pleaded, proved, or found below. Petitioners had no occasion to point out the Court of Appeals' failure to note the lack of evidentary support for its waiver theory until they filed their petition for rehearing (R. 165). We respectfully direct this Court's attention to that petition for a

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freezing injury is present in the load shall be made or caused to be made by the purchaser as soon as possible after the receipt of such notice of arrival, and the further inspection of the produce for the purpose of determining whether the produce meets the requirements of the contract of purchase and sale may be deferred until such time as the temperature and weather conditions will permit such inspection to be safely made, but reasonable time shall not extend beyond the time when such inspection can be safely made. The meaning of the terms 'as soon as possible' and 'safely made' shall be determined upon a consideration of all the facts and circumstances shown to exist in each case: Provided, That if the receiver has made arrangements to be notified of arrival on Sunday or a legal holiday, and if he is so notified, the 24 hour period shall run from 12:01 a. m., to 12 midnight on the next day."

detailed statement of that Court's factual errors (R. 171-176).

SPECIFICATION OF ERRORS.

1. The Court below erred in holding that it could affirm the reparation order on grounds not presented to the Secretary or the District Court.

2. The Court below erred in interpreting Section 2(2) of the Perishable Agricultural Commodities Act as penalizing a refusal of a proferred delivery not in accordance with the terms of the written contract.

3. The Court below erred in interpreting Section 2(2) of the Act as rendering unlawful a refusal to purchase merchandise inspection of which had been refused.

4. The Court below erred in sustaining, on other grounds, a reparation award obtained by false representations to the Secretary of Agriculture.

5. The Court below erred in failing to remand the case to the Secretary of Agriculture for further proceedings.

REASONS FOR GRANTING THE WRIT.

I. In affirming the reparation award upon a theory raised for the first time by the Court of Appeals in its opinion, that Court deprived petitioners of their statutory and constitutional right to a trial.

In denying the petition for rehearing, the Court of Appeals held that it could affirm the petitioners' conviction on grounds not presented below, and which petitioners had not even had an opportunity to argue in the Court of Appeals itself. The statute under which the petitioners were convicted provides for a *trial de novo in the District Court upon the complaint filed before the Secretary of Agriculture.* Such a trial was had, and, as the Court of Appeals determined, the written contract and deliveries alleged in the complaint were shown by the uncontradicted evidence not to have been made. The Court of Appeals, however,

held that it could examine the evidence and affirm the award on the theory that the petitioners had violated a different parol contract implied from the conduct of the parties. This decision was squarely in conflict with decisions of this Court and a prior decision of the same Court of Appeals, which forbid affirmance on a ground not presented at the trial, where prejudice to the appellant results. *Saunders* v. *Shaw,* 244 U. S. 317, *Helis* v. *Ward,* 308 U. S. 365, 370; and *Scott* v. *Howell,* 27 App. D. C. 395, 401. The prejudice here is a denial of the kind of hearing that both the statute and the Fifth Amendment guarantee, one in which the defendant has "a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *United States,* 304 U. S. 1, 18.

The prejudice to these petitioners is apparent upon the face of the Court of Appeals opinion. It was undisputed that the only *written* contract for one and two pound boxes was the contract set out in the opinion (R. 157) which was never performed by the seller. The Court of Appeals determined that a new *parol* contract could be implied from the conduct of the parties. The only documents relating to this new contract were three drafts drawn by the seller which the Court of Appeals found petitioners promised *orally* to pay.[6] There was never any acceptance of any part of the merchandise covered by this alleged new contract, nor was there any earnest money or part payment. There was, therefore, a Statute of Frauds defense.[7]

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[6] The Secretary and the District Court found only that petitioners *refused* to pay these drafts (R. 42, 51, 52).

[7] The uniform Sales Act, which has been adopted in the District of Columbia (Title 28, District of Columbia Code, 1940, § 1104) and in Michigan (Michigan Compiled Laws, 1948, § 440.4), provides: "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually received the same, or give something in earnest to bind the contract, or in partial payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

The Court of Appeals did not consider this Statute of Frauds defense (R. 155) which was eliminated below only because Fruit Processors chose to rely at the trial on its claim that it delivered the merchandise in question in accordance with the terms of the written contract. If it had asked the Trial Court to find that the delivery or price provisions were modified by subsequent conduct, it would have had to amend its complaint to allege the specific conduct on which it relied to establish the modifications.[8] Had such an amendment been made, the petitioners would have had an incontestable right to raise the Statute of Frauds as a defense and would have had an opportunity to direct their evidence to showing that no such parol contract had been made.

The Court of Appeals also failed to notice the prejudice to any litigant implicit in the creation and disposition of decisive factual issues by an appellate court. Its failure to remand such issue for trial is in conflict with *Frieze* v. *West American Ins. Co.*, 190 F. 2d 381 (CCA 8, 1951), which held that where an appellate court considers new issues, "the case will be remanded for decision, by the trial court,

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The Department of Agriculture's Service and Regulatory Announcements No. 21, issued in May, 1943, to guide complainants under this Act, makes the following statement under the heading, Contracts of Sale, on page 21: "It is important that the essential terms of sale be stated in writing in order to meet the requirements of the statute of frauds. This may be done (a) by a confirmation of sale signed by the purchaser and by the vendor or his authorized agent, usually a broker, or by a memorandum of sale signed only by the broker or other authorized agent on behalf of the purchaser, (b) by correspondence which identifies the produce and states the terms of sale, or (c) by telegrams provided the produce is identified and the essential terms of sale are covered." There were no correspondence or telegrams in this case which met the requirements of (b) or (c) and Fruit Processors was compelled to rely upon the terms of the broker's memorandum in order to state a case.

[8] Section 47.27(c) of the Rules of Practice under the Act provides that the complaint shall state "the allegations of fact which constitute a basis for the proceeding and shall specify with particularity the matters or things in issue."

of any uncertain or disputed facts related to such issues" (p. 382). As pointed out in the petition for rehearing, the evidence as to the promise to pay the drafts, found only by the Court of Appeals, was sharply disputed (R. 173). The record citations in that petition also show that the Court of Appeals' findings as to a tender of warehouse receipts and a break in the market price before the inspection request are supported by no evidence (R. 176). Review should be granted to resolve the conflict with the Frieze case and to conform the practice in the court below with the due process requirements of this Court's decisions.

II. In its decision, the Court of Appeals erroneously determined an important question of the construction of the Perishable Agricultural Commodities Act, not heretofore considered by this Court.

The Court of Appeals' views as to the conduct prohibited by Section 2(2) of the Act are at variance with those of its congressional sponsors, the other Courts of Appeal which have construed it, and the Secretary of Agriculture. This error in statutory construction is important because it subjects ordinary commercial transactions to the licensing and penal provisions of a statute intended to deal only with conduct involving an element of fraud and violates the express representations by which Congress was induced to enact the Perishable Agricultural Commodities Act.

If the determination by the Court of Appeals is correct, the licensing and penal provisions of the Act may be used for the enforcement of a claim for damages arising only from a rejection of a proposed delivery. While this Court has never interpreted Section 2 (2), the other Courts of Appeal[9] have uniformly interpreted the rejection provision

[9] In each of the cases decided by Courts of Appeals, there was proof of an actual shipment of the merchandise and in none was the buyer refused inspection. In *LeRoy Dyal Co.* v. *Allen*, 161 F. 2d 152, the Fourth Circuit Court of Appeals held that a rejection of ten carloads of potatoes was without reasonable cause when the grounds of rejection were that the inspection certificates were

as applying only in those cases where the seller has put the merchandise beyond his control by making a shipment in accordance with the terms of the contract.

The problem with which Congress was attempting to deal in enacting the rejection provision was that of the widespread losses caused to shippers of produce by fraudulent conduct of dealers and brokers at markets remote from the shippers. The receiver of such merchandise frequently notified such a shipper that he would not accept the goods at the contract price. The shipper, because of the distance and the perishable nature of the goods, was unable to protect his interests, and was forced to submit to such unscrupulous practices to avoid losing the merchandise entirely.[10] The purpose of the rejection provision of Section 2(2) of the Act was summed up in *LeRoy Dyal Co.* v. *Allen*, 161 F. 2d 152, 156 (CCA 4, 1947) as being to prevent the "wrongful rejection of goods upon arrival at a point where it is expensive and impracticable for the shipper to enforce his legal rights."

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issued on the goods one to three days prior to the actual shipment. The merchandise was received and inspected by the buyer at the specified delivery point and found to be in good condition. In *Fadler Co* v. *Hesser*, 166 F. 2d 904, the Ninth Circuit Court of Appeals held that a carload of vegetables which was inspected and found in poor condition when received was properly rejected. In *Gillarde Co.* v. *Martinelli*, 168 F. 2d 276, the First Circuit Court of Appeals held that a carload of spoiled melons was improperly rejected because the regulation of the Secretary defining the contract terms limited the buyer's remedy to a suit for damages. Upon rehearing, that Court, in contrast to the Court below, modified its opinion to give effect to a settled policy of the Secretary in the administration of the Act. 169 F. 2d 60. In *Martinelli* v. *Siegel Co.*, 176 F. 2d 98, the First Circuit remanded an issue of fraud for trial in the District Court which was raised by a buyer who had rejected a carload of grapes upon other grounds. The Circuit Court held that fraud in the inception of the contract of sale would justify the rejection even though it had not been relied upon by the buyer when the rejection occurred.

[10] See the report of the Senate Committee on Agriculture and Forestry accompanying Senate Bill 108, 71 Congress, filed May 3, 1929, and the debates in the House of Representatives, 72 Cong. Rec., Part 8, pp. 8537-8547.

In administering the Act, the Secretary of Agriculture has steadfastly refused to make a reparation award where the goods were not shipped in accordance with the contract.[11] In every case in which this rejection provision of the statute has been considered by a Court of Appeals, the seller had relinquished control by shipping the goods under negotiable bills of lading which made it possible for the seller to obtain title to the merchandise upon payment of the purchase price.

Only a shipment or surrender of title offers the buyer an opportunity to commit the unfair conduct by rejecting merchandise which Section 2(2) of the Act prohibits. In this case, the seller retained title and control of the goods at all times, and even by paying the drafts, the buyers would not necessarily have obtained possession or title to the goods. In the absence of a shipment or transfer of title to the buyer, the purpose of the Perishable Agricultural Commodities Act in penalizing rejection "without reasonable cause" had no application to the transaction, and the Court of Appeals misconstrued the meaning of Section 2 (2) in applying the penalties of the Act to the petitioners.

Prior to the opinion below, no Court of Appeals opinion dealing with the Perishable Agricultural Commodities Act has even remotely suggested that a seller may demand payment before he delivers the merchandise, refuse any inspection, dispose of the merchandise at distress prices and then collect the contract price by charging the buyer with a

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[11] Beginning with the first proceeding filed under the Act, *American Fruit Growers* v. *F. C. Spandaro*, Docket #1, the Secretary has insisted that the seller deliver in accordance with the terms of the contract before finding a rejection in violation of the Act. Examples of cases in which the Secretary has insisted upon delivery in strict compliance with the terms of the written contract are *In re A. N. Bearman*, Docket #3344, an anonymous case reported at 4 Agriculture Decisions 249, and *Ragatz* v. *Dallas Wholesale Grocery Co.*, 5 Agriculture Decisions 472. In the *Ragatz* case, the seller had actually shipped the goods in accordance with the contracts, but the Secretary found no violation by the buyer because the shipping documents and sight drafts were not presented to the bank specified in the contract.

violation of Section 2 (2). The opinion of the Court of Appeals below is an important departure from the existing judicial and administrative construction of an Act which has a decisive impact on all produce dealers. They are licensed to do business by the Department of Agriculture and the Secretary can and does put them out of business by suspending or revoking their licenses if they violate the Act. See App. I, pp. 25-26. The livelihood of these dealers should not be placed in jeopardy by a novel construction of the Act, which ignores its purpose and the principles established by the other Courts of Appeals and the Secretary in enforcing it.

III. The opinion of the Court of Appeals has unwittingly sanctioned what may be a fraudulent claim in the course of enforcing a statute intended to prevent fraud.

There was no sound practical reason for refusing the requested federal inspection at petitioners' expense, if the merchandise was in fact in accordance with the contract. The certificate of the Department of Agriculture inspectors would have been prima facie evidence of the condition of the merchandise in this or any other federal litigation concerning it.[12] The inspection would have hurt Fruit Processors only if the merchandise was not in the warehouse, was improperly packed, or was otherwise in poor condition.

The telegraphed reply of the Processed Products Inspector of the Department's Chicago office (Lerman, Ex. 7 R. 146) to petitioners' telegraphed request for inspection (Lerman Ex. 6, R. 145) stated that he could not locate one of the lots for which drafts had been issued. Since Fruit Processors was unable to prove any specific shipment which matched any of the three drafts it was apparently trying to collect from petitioners for merchandise which might well have been packed for others.

Although Fruit Processors sought to convey the impression that it had stamped petitioners' labels on the boxes in

[12] 7 U. S. Code, § 499n.

suit by proving receipt of the labels, it offered no testimony that any of these labels had actually been stamped upon any of the merchandise for which the drafts were issued. Since the labels[13] themselves describe the contents as sixteen and twelve ounces, respectively, no one could truthfully have testified that either was stamped upon a two-pound (32 ounce) box. It also appeared that 4,000 pounds of the two-pound boxes in storage which allegedly had been packed for petitioners had been actually delivered to W. T. Smith Company as the result of an alleged error (R. 31). Such an "error" could not have occurred if the boxes had carried Lerman Brothers' label.

The fact that petitioners were billed for merchandise never packed for them is also indicated by sales allegedly made in mitigation of Fruit Processors' damages in November, 1946 (R. 15). This was *two months before* petitioners received from Fruit Processors' attorney its final demand that if payment was not made it would then (January 30, 1947) "dispose of this special pack of raspberries for the best price obtainable" (R. 38). The warehouse receipts for the raspberries allagedly sold to mitigate damages are also not the receipts for the raspberries allegedly shipped to the warehouse for petitioners' account.[14]

What Fruit Processors apparently did was to charge to petitioners' account sales of inferior merchandise made to others at much lower prices, and claim the difference as damages for petitioners' alleged rejection of the merchandise allegedly shipped to the warehouse for their account. Unlike petitioners, these purchasers were permitted to sample the merchandise (R. 81). Petitioners offered to

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[13] The labels, attached to the complaint in Exhibit 25 were omitted from the joint appendix below. We have therefore printed that exhibit as Appendix 2 to this petition (p. 27).

[14] The receipts relied upon to show these shipments are numbered 7062, 7066, 7068, and 7072, respectively (R. 24-28). The receipts for the merchandise sold in alleged mitigation of damages arising out of petitioners' alleged rejection of those shipments include numbers 7462, 7434, and 9310 (R. 33, 34).

show that on the day they requested inspection they had orders for the merchandise which would have disposed of it without loss if it proved to be merchantable (R. 121-122, 126). The offer was rejected, apparently because the District Court thought this testimony immaterial to the issues made by the complaint, but it would certainly have been admissible to rebut the Court of Appeals' erroneous suggestion that the inspection request was prompted by a falling market (R. 162). In the absence of any tender of shipping documents or an inspection of the merchandise, Fruit Processors had complete power to build its subsequent claim before the Secretary upon allegations difficult for the petitioners to disprove.

The Court of Appeals apparently assumed that petitioners' default before the Secretary made all its defenses an afterthought and treated them accordingly. The fact that petitioners wrongly relied on a prior letter to the Secretary denying liability as an adequate answer to the complaint and failed to employ counsel until after they were threatened with suspension of their license (R. 44-45) may brand them as negligent but the issue here was whether they were guilty of unlawful conduct. The default properly deprived petitioners of an initial hearing before the Secretary on the respondent's complaint. It also cast upon them the burden of producing evidence in the District Court to show that the Secretary's material findings were in error. But the Statute gave them a trial de novo in that Court and they waived none of their defenses by failing to present them to the Secretary. *Fadler Co.* v. *Hesser,* 166 F. 2d 904 Petitioners were entitled to assume that when it appeared that the award was based upon false allegations in the complaint, the award would be set aside.

The statutory scheme of enforcement lodges primary responsibility in the Secretary (see App. I, pp. 21-23) and the petitioners are entitled to a hearing before him if their liability is to be determined upon facts not alleged in the only complaint which he has thus far considered. Where,

as here, important questions as to the construction of the Statute and the Secretary's regulations have been raised for the first time by the Court of Appeals, the case should in any event go back to the Secretary in order that his views as to these questions may be embodied in appropriate findings.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted, and the judgment of the Court of Appeals reversed.

Respectfully submitted,

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Attorneys for Appellants.

APPENDIX 1.

TEXT OF THE ACT

(46 STAT. 531—71ST CONGRESS)

As amended by acts effective April 13, 1934 (48 Stat. 584), June 19, 1936 (49 Stat. 1533), August 20, 1937 (50 Stat. 725, June 23, 1938 (52 Stat. 953), May 14, 1940 (54 Stat. 214), June 29, 1940 (54 Stat. 696), and April 6, 1942 (56 Stat. 200)

AN ACT TO SUPPRESS UNFAIR AND FRAUDULENT PRACTICES IN THE MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES IN INTERSTATE AND FOREIGN COMMERCE

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when used in this Act—

(1) The term "person" includes individuals, partnerships, corporations, and associations;

(2) The term "Secretary" means the Secretary of Agriculture;

(3) The term "interstate or foreign commerce" means commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia;

(4) The term "perishable agricultural commodity"—(A) means any of the following, whether or not frozen or packed in ice: Fresh fruits and fresh vegetables of every kind and character; and (B) includes cherries in brine as defined by the Secretary in accordance with trade usages;

(5) The term "commission merchant" means any person engaged in the business of receiving interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another;

(6) The term "dealer" means any person engaged in the business of buying or selling in carloads any perishable agricultural commodity in interstate or foreign commerce, except that (A) no producer shall be considered as a "dealer" in respect of sales of any such commodity of his own raising; (B) no person buying any such commodity solely for sale at retail shall be considered as a "dealer" in respect of any such commodity in any calendar year

until his purchases of such commodity in carloads in such year are in excess of twenty; and (C) no person buying any such commodity for canning and/or processing within the State where grown shall be considered a "dealer" whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen or packed in ice, or consists of cherries in brine, within the meaning of paragraph 4 of this section. Any person not considered as a "dealer" under clauses (A), (B), and (C) may elect to secure a license under the provisions of section 3, and in such case and while the license is in effect such person shall be considered as a "dealer." As used in this paragraph, the term "in carloads" includes wholesale or jobbing quantities as defined for any such commodity by the Secretary;

(7) The term "broker" means any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively;

(8) A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act.

UNFAIR CONDUCT

SEC. 2. It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

(1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perish-

able agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce;

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer;

(3) For any commission merchant to discard, dump, or destroy without reasonable cause any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce;

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;

(5) For any commission merchant, dealer, or broker, for a fraudulent purpose, to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State or country of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce;

(6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in compliance with any Federal or State law or regulation as to the grade or quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced;

(7) For any commission merchant, dealer, or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit re-sorting and discarding inferior produce.

* * * * * * * * * *

LIABILITY TO PERSON DAMAGED

SEC. 5. (*a*) If any commission merchant, dealer, or broker violates any provision of section 2 he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(*b*) Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at comomn law or by statute, and the provisions of this Act are in addition to such remedies.

COMPLAINT AND INVESTIGATION

SEC. 6. (*a*) Any person complaining of any violation of any provision of section 2 by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Secretary, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Secretary to the commission merchant, dealer, or broker, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Secretary.

(*b*) Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any employee of the United States Department of Agriculture or any interested person may file, in accordance with rules and regulations of the Secretary, a complaint of any violation of any provision of this Act by any commission merchant, dealer, or broker and may request an investigation of such complaint by the Secretary.

(*c*) If there appear to be, in the opinion of the Secretary, any reasonable grounds for investigating any complaint made under this section, the Secretary shall investigate such complaint and may, if in his opinion the facts warrant such action, have said complaint served by registered mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the said person is engaged in business: *Provided,* That in complaints wherein the amount claimed as damages does not exceed the sum of $500 a hearing need not be held and proof in support of the complaint and in support of respondent's answer may be supplied in the form of depositions or verified statements of fact;

(*d*) After opportunity for hearing on complaints where the damages claimed exceed the sum of $500 has been provided or waived and on complaints where damages claimed do not exceed the sum of $500 not requiring hearing as provided herein, the Secretary shall determine whether or not the commission merchant, dealer, or broker has violated any provision of section 2;

(*e*) In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Secretary of Agriculture against the complainant on any counter claim by respondent: *Provided,* That the Secretary shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

REPARATION ORDER

SEC. 7. (*a*) If after a hearing on a complaint made by any person under section 6, or without hearing as provided in section 6, paragraphs (*c*) and (*d*), or upon failure of the party complained against to answer a complaint duly served within the time prescribed, or to appear at a hearing after being duly notified, the Secretary determines that the commission merchant, dealer, or broker has violated any provi-

sion of section 2, he shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. If, after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary under such rules and regulations as he shall prescribe, unless the respondent has already made reparation to the person complaining, may issue an order directing the respondent to pay to the complainant the undisputed amount on or before the date fixed in the order, leaving the respondent's liability for the disputed amount for subsequent determination. The remaining disputed amount shall be determined in the same manner and under the same procedure as it would have been determined if no order had been issued by the Secretary with respect to the undisputed sum;

(*b*) If any commission merchant, dealer, or broker does not pay the reparation award within the time specified in the Secretary's order, the complainant, or any person for whose benefit such order was made, may within three years of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the commission merchant, dealer, or broker, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States. Such suit in the district court shall proceed in all respects like other civil suits for damages, except that the findings and orders of the Secretary shall be prima-facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit;

(*c*) Either party adversely affected by the entry of a reparation order by the Secretary may, within thirty days

from and after the date of such order, appeal therefrom to the district court of the United States for the district in which said hearing was held: *Provided,* That in cases handled without a hearing in accordance with paragraphs (*c*) and (*d*) of section 6 or in which a hearing has been waived by agreement of the parties, appeal shall be to the district court of the United States for the district in which the party complained against is located. Such appeal shall be perfected by the filing of a notice thereof together with a petition in duplicate which shall recite prior proceedings before the Secretary, and shall state the grounds upon which petitioner relies to defeat the right of the adverse party to recover the damages claimed, with the clerk of said court with proof of service thereof upon the adverse party, together with a bond in double the amount of the reparation award conditioned upon the payment of the judgment entered by the court plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. The clerk of court shall immediately forward a copy thereof to the Secretary of Agriculture, who shall forthwith prepare, certify, and file in said court a true copy of the Secretary's decision, findings of fact, conclusions, and order in said case, together with copies of the pleadings upon which the case was heard and submitted to the Secretary. Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated. Appellee shall not be liable for costs in said court and if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs. Such petition and pleadings certified by the Secretary upon which decision was made by him shall upon filing in the district court constitute the pleadings upon which said trial de novo shall proceed subject to any amendment allowed in that court;

(*d*) Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until

he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment: *Provided,* That if on the appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of ten days from the date of the judgment on the appeal unless prior thereto the judgment of the court has been satisfied.

SUSPENSION AND REVOCATION OF LICENSE

SEC. 8. (*a*) Whenever (*a*) the Secretary determines, as provided in section 6, that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (*b*) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14 (*b*) of this Act, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may by order revoke the license of the offender;

(*b*) The Secretary may, after thirty days' notice and an opportunity for a hearing, revoke the license of any commission merchant, dealer, or broker, who, after the date given in such notice, continues to employ in any responsible position any individual whose license was revoked or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked. Employment of such individual by a licensee in any responsible position after one year following the revocation of any such license shall be conditioned upon the filing by the employing licensee of a bond, in such reasonable sum as may be fixed by the Secretary, or other assurance satisfactory to the Secretary that its business will be conducted in accordance with the provisions of this Act;

(*c*) If, after a license shall have been issued to an applicant, the Secretary believes that the license was obtained through a false or misleading statement in the application therefor or through a misrepresentation, concealment, or withholding of facts respecting any violation of the Act by any officer, agent, or employee, he may, after thirty days' notice and an opportunity for a hearing, revoke said license,

whereupon no license shall be issued to said applicant or any applicant in which the person responsible for such false or misleading statement or misrepresentation, concealment, or withholding of facts is financially interested, except under the conditions set forth in paragraph (*b*) of section 4;

(*d*) In addition to being subject to the penalties provided by section 3 (*a*) of this Act, any commission merchant, dealer, or broker who engages in or operates such business without a valid and effective license from the Secretary shall be liable to be proceeded against in any court of competent jurisdiction in a suit by the United States for an injunction to restrain such defendant from further continuing so to engage in or operate such business, and, if the court shall find that the defendant is continuing to engage in such business without a valid and effective license, the court shall issue an injunction to restrain such defendant from continuing to engage in or to operate such business without such license.

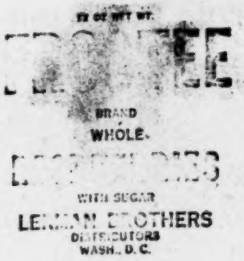
* * * * * * * * * *

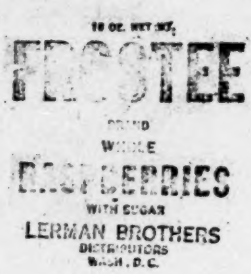
SEC. 15. The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act, and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, binding, telegrams, telephones, law books, books of reference, publications, furniture, stationery, office equipment, travel, and other supplies and expenses, including reporting services, as shall be necessary to the administration of this Act in the District of Columbia and elsewhere, and as may be appropriated for by Congress; and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for such purpose. This act shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this Act; but it is intended that all such statutes shall remain in full force and effect except in so far only as they are inconsistent herewith or repugnant hereto.

* * * * * * * * * *

APPENDIX 2

The following is imprints made from rubber stamps supplied to Fruit Processors, Inc. in July 1946 for use on packages of red raspberries.





These stamps were new and on the side of each is the name:

Hay Rubber Stamp Co.
Washington, D.C.

COPY

FILED
OCT 25 1948
HARRY M. HULL, Clerk

EXHIBIT NO. 25

FILE COPY

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CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 364

HARRY LERMAN, MYER LERMAN, and SAMUEL LERMAN, Co-partners trading as LERMAN BROTHERS, *Petitioners*;

v.

FRUIT PROCESSORS, INC., a corporation, *Respondent*.

REPLY BRIEF OF PETITIONERS.

ROBERT L. WRIGHT,
CARL W. BERGERT,
Attorneys for the Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 364

HARRY LERMAN, MYER LERMAN, and SAMUEL LERMAN, Co-partners trading as LERMAN BROTHERS, *Petitioners,*

v.

FRUIT PROCESSORS, INC., a corporation, *Respondent.*

REPLY BRIEF OF PETITIONERS.

The sole purpose of this reply is to direct attention to a material misstatement of fact, made for the first time in respondent's brief in opposition to the petition for certiorari. At page 6 of that brief, counsel erroneously assert that the unpaid drafts were sent "with Bill of Lading attached." This misstatement is repeated at page 7 when they describe the warehoused merchandise as "subject to the sight drafts with the Bill of Lading attached."

No bill of lading was issued for this merchandise because the only shipments were to the Chicago warehouse (R. 62-64) which held the merchandise under non-negotiable receipts issued to the respondent (R. 24-29). The sight drafts for this merchandise were accompanied by warehouse transfer orders and respondent proposed to make delivery and

pass title at Chicago only *after* the drafts were paid by petitioners' Washington bank (R. 70-71).[1] By now recklessly asserting that bills of lading were attached to the drafts, the respondent, in effect, concedes that the Act only penalizes a rejection of a sight draft which is accompanied by a document which will vest title in the buyer simultaneously with payment of the draft.

Neither the Court of Appeals, the District Court, the Secretary, nor any witness suggested that any bill of lading for the merchandise covered by the unpaid drafts was ever sent to petitioners or their bank. The statement in counsel's brief that bills of lading for this merchandise accompanied the sight drafts has no support in the record made below. There would be no occasion for its insertion and repetition in respondent's brief in this Court if respondent felt that the petition could be successfully opposed on the basis of either the facts found in the Court of Appeals' opinion or the record.

Respectfully submitted,

ROBERT L. WRIGHT,
CARL W. BERUEFFY,
Attorneys for the Petitioners.

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[1] As we pointed out in our petition for rehearing (R. 170-171), the Court of Appeals erroneously found that each draft was "accompanied by a Chicago warehouse receipt" (R., 161). The contract of sale (R., 142) made no provision for delivery at Chicago by any method.

FILE COPY

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FILED
OCT 24 1951
CHARLES ELMORE CROPLEY
CLERK

No. 364

IN THE

Supreme Court of the United States

October Term, 1951

Ralph Lemmon, Mark Lemmon and Sharon Lemmon, Co-partners trading as Lemmon Electronics,

Petitioners,

v.

Ferro Photoseal, Inc., a corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO ISSUANCE OF A WRIT OF CERTIORARI

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Attorneys for Respondent.

Erwin H. Wolcott
Of Counsel
St. Joseph, Michigan

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In The

Supreme Court of the United States

October Term, 1951

No. 364

Harry Lerman, Myer Lerman and Samuel Lerman,
Co-partners trading as Lerman Brothers,
Petitioners,

v.

Fruit Processors, Inc., a corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO ISSUANCE OF A WRIT OF CERTIORARI

Respondent opposes issuance of the writ of certiorari on the following grounds:

I.

Petitioners Had a Full Hearing De Novo in the District Court and Decision of the Court of Appeals Affirming the Findings of the Secretary and the District Court is Conclusive.

The first reason relied upon for reviewing the decision and findings of the three tribunals who have heard and determined this case is that the theory upon which the Circuit Court of Appeals affirmed the judgment deprived

petitioners of their constitutional right to a trial. There is no such theory in the decision of the Court of Appeals, and the petitioners had a full hearing and trial de novo.

The Perishable Agricultural Commodities Act of 1930 (7 U. S. C. A., 499), providing for an appeal from the Secretary of Agriculture to the District Court of the United States (a) provides that the appellant "shall state the grounds upon which petitioner relies to defeat the right of the adverse party to recover the damages claimed." (Tr. 148).

The petition for review stated the following grounds:

> (a) That the petitioners never entered into a contract for the purchase of any specified quantity of red raspberries claimed;
> (b) That the raspberries tendered were in a warehouse in Chicago and the petitioners were denied inspection for quality; and,
> (c) That the complainant did not act reasonably to mitigate damages. (Tr. 154).

In the pre-trial proceedings, these grounds of relief were reiterated and the petitioners there also contended that the contract was required to be in writing under the Statute of Frauds (Tr. 155). After the evidence was in, the District Court declared (Tr. 139):

> "The transaction is not within the statute of frauds."

As found by the Court of Appeals, "the issue of the Statute of Frauds was thus expressly eliminated by the trial court, without objection by appellants. They do not present that issue here." (Tr. 155). This is directly contrary to the false statement made by the petitioners on page 9 of the Petition that "there was, therefore, a Statute of Frauds' defense."

The Statute of Frauds had no place in the defense for the reason that aside from the memoranda of sale signed

by the joint broker, the petitioners sent respondent containers for the specially packed and frozen raspberries; they sent the rubber stamp to be placed upon the containers with their own brand of "Lerman's Frostee Brand." They had the goods specially packed for them and accepted and paid for a shipment of $16,000.00 out of a total of $31,140.00 worth of frozen red raspberries and cherries covered by the various drafts which the petitioners repeatedly promised to pay.

After the findings of the Secretary of Agriculture and the hearings before the District Court on all of the facts and after the failure of the respondent to rely upon the Statute of Frauds in its petition for review and its failure to raise the issue in the Court of Appeals, to attempt to raise the issue now in this Court proposes a serious question of the good faith of counsel and makes it perfectly clear that the first reason assigned for granting the writ is wholly specious.

The allegation of the petitioners that the Court of Appeals affirmed the award on the theory that the petitioners had violated a different parol contract, or that there was an alleged new contract, is wholly fictitious since there was but one contract and the memoranda of sale set forth the essentials thereof. This position of the petitioners is clearly an afterthought, and is within the closing language of this Court in *Helis* v. *Ward*, 308 U. S. 365, 370, 84 L. ed. 365, 371, cited for the petitioners, wherein it is said:

> "Accordingly, petitioner cannot now complain that he has not had his day in court and has been deprived of due process of law contrary to the Fifth Amendment. Due process of law is not concerned with mere afterthoughts."

Further, the petitioners declared that the "Court of Appeals, however, held that it could examine the evidence and affirm the award on the theory that the peti-

tioners had violated a different parol contract implied from the conduct of the parties." (Pe., p. 8).

The Court of Appeals did not examine the award on any theory that the petitioners had violated a different parol contract. That Court specifically declared that the sales "were all parts of one transaction" (Tr. 158); and that the memoranda of sale confirming the transaction "set forth the essentials of the contract as to the berries involved in this suit." (Tr. 160).

The Secretary of Agriculture found that the prices of the 1 and 2 lb. packages of frozen red raspberries were agreed upon. (Tr. 40). Beasley, the salesman for the joint broker, who made the agreement with Lerman, and was called to testify by Lerman, testified (Tr. p. 100-101) that these prices were agreed upon, and that the raspberries in the 1 lb. containers were one cent more per lb. than the 2 lb. containers because of the additional labor costs in packing the smaller containers. Lerman made no denial of this agreement. The District Court found that there was an agreed price for the 1 lb. and 2 lb. containers of frozen red raspberries (Tr. 50).

The Perishable Agricultural Commodities Act (Tr. 148) specifically provides "that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated." No evidence was presented by the respondent to rebut or overcome the Secretary's findings. It is idle to now assert that the Court of Appeals decided this case on any other theory than that the findings of the Secretary were correct.

We think the case cited for the petitioners, *Scott* v. *Herrell*, 27 App. D. C., 935, is clearly in point for the respondent in that the Court held that a judgment can not be affirmed upon any ground not taken at the trial. It is equally clear that it can not be reversed on a ground not taken at the trial.

II.

The Perishable Agricultural Commodities Act and the Secretary's Regulations Pursuant Thereto are Clear and Were Correctly Construed.

The next reason assigned by the petitioners for the issuance of a writ of certiorari is that the Court of Appeals erroneously construed the Perishable Agricultural Commodities Act, which Act has not been heretofore considered by this Court.

To support the proposition of an erroneous construction, the petitioners assert that a seller may not demand payment before he delivers the merchandise and collect the contract price by charging the buyer with a violation of Section 2 (2).

No such contention was made below, and the clear terms of the statute itself shows its fallacy since it provides that (p. 147): "It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

> "(1) • • •
>
> "(2) For any dealer to *reject* or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold on *contracted to be bought, sold, or consigned* (italics supplied) in interstate or foreign commerce by such dealer."

If there could be any question about the interpretation of this Act, the Regulations for the Enforcement of the Perishable Agricultural Commodities Act, promulgated by the Department of Agriculture, under the terms of the Act, put the construction beyond question, in the following provision (Tr. 150):

> "(q) 'Reject without reasonable cause' means the act of any person, who has purchased or offered to handle on consignment or otherwise, for or on behalf

> of another, produce in commerce, (1) of refusing or failing to accept such produce within a reasonable time, or (2) of advising the seller or shipper or his agent that such produce will not be received in accordance with the contract or offer or (3) of indicating an intention not to accept such produce through an act or failure to act inconsistent with the contract."

These regulations of the Secretary of Agriculture, not being in conflict with the statute, but in conformity therewith, have the force and effect of law. The decisions to this effect are numerous and uniform. *Columbia Broadcasting System* v. *United States,* 316 U. S. 407, 86 L. ed. 1573; *Maryland Casualty Company* v. *United States,* 251 U. S. 342, 64 L. ed. 297.

Drafts on July 10th, July 12th and July 25th, 1946, were sent to the American Security and Trust Company with Bill of Lading attached and petitioners notified. The Court of Appeals found (p. 159):

> "Thereafter, repeated requests were made for payment of this and two earlier drafts and repeatedly appellants promised to pay the drafts, giving as reason for delay that they were temporarily short of funds. However, no payment was made. On August 6, appellants demanded inspection which was refused by appellee the following day in a telegram stating that, unnless the drafts were paid by August 7, appellee would withdraw them and sell the berries holding appellants for any loss. It was not until the pre-trial proceedings—twenty months after the order of reparation—that appellants ever questioned this provision of the contract."

It was, therefore, a clear rejection of these goods, and the authority of the Secretary of Agriculture to award reparation cannot be questioned.

III.

No Fraud of the Respondent Was Asserted in the Trial Court, But That Court Held Petitioners' Demand for Inspection Was Made in Bad Faith.

The next reason assigned for issuance of the writ of certiorari is that the Court of Appeals sanctioned what might be a fraudulent claim in that they did not sustain the petitioners' requested inspection of the frozen fruit at the warehouse in Chicago.

As heretofore shown herein from the opinion of the Court of Appeals, no inspection was demanded when the fruit was being packed. The demand was made after the fruit was frozen and was in the warehouse in Chicago, subject to the sight drafts with the Bill of Lading attached, until the respondent wired the petitioners that unless the drafts were paid by August 8th, the respondent would withdraw them and sell the berries, holding the petitioners for any loss (Tr. 159). Further than this, the District Court, who heard the testimony of petitioner Lerman, made the following statement (Tr. 141):

> "The Court holds that the claim of the right to inspect was not made by Lerman in good faith and is, in fact, an afterthought."

The District Court also held (Tr. 140):

> "Lerman claims that he had the right of inspection before making payment. If he had such right it was not by virtue of the contract, but wholly because of the Secretary's Regulation 26.24(i).
>
> "If, as claimed by Lerman, he had the right of inspection, the right existed for a reasonable time only after notice of arrival of the goods at the point of destination."

That Court further called attention to the Secretary's Regulation, Sub-section (s):

"Acceptance includes any action by a purchaser which is inconsistent with the rejection of produce."

It is further contended for the petitioners that since the statute gave them a trial de novo in the District Court, they waived none of their defenses by failing to present them to the Secretary.

The statute provides, as heretofore set out, that in their petition for review of the findings of the Secretary, they shall state prior proceedings before the Secretary and shall state the grounds upon which the petitioners rely to defeat the right of the adverse party to recover the damages claimed. There was no claim of fraud made in their petition for review, nor in any of the proceedings before the trial court. To assume or infer fraud in order to obtain the issuance of a writ of certiorari is not complimentary to counsel for the petitioners.

Finally, the case was fully heard in the District Court where the petitioners called to the witness stand every person familiar with the transaction—Elder, the general manager of the respondent; Beasley, the employee whom Dietrich sent at the request of the petitioners to the respondent to purchase these frozen fruits; Dietrich, the joint broker; and Lerman, the respondent. Every phase of the transaction was gone into—the sale and purchase, the terms, the memoranda of the joint broker, of which each party had copies, the forwarding of bills of lading with sight drafts attached as provided in the contract, notice to the purchasers of the sight drafts and repeated promises by the purchasers to pay them. There was no evidence, or fact, which was not available to the petitioners at the trial, and practically all of this evidence was adduced without objection, much of it by the petitioners themselves. To grant a writ of certiorari with the object of returning this case either to the Secretary of Agriculture, or to the lower court, where the respondent was

fully heard, would be but to take another and a fourth bite at the same raspberries and retry the issues already fully determined.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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